IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WALTON N. MOORE DRY GOODS CO. (a corporation), J. H. NEWBAUER & COMPANY (a corporation), G. W. REYNOLDS CO., INC. (a corporation), and L. DINKELSPIEL CO., INC. (a corporation), *Appellants,* vs. A. F. LIEURANCE and PHILIP A. HERSHEY as Receivers of R. A. Pilcher Co., Inc. (a corporation), Bankrupt, *Appellees.*	In Equity No. 5660

CLOSING BRIEF OF OBJECTING CREDITORS.

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CLOSING BRIEF OF OBJECTING CREDITORS.

The reply brief for A. F. Lieurance, as Receiver, and Edward R. Eliassen, as his attorney, is interspersed with attacks upon the motives of the objecting creditors and their attorneys in initiating and prosecuting these proceedings. Neither the opening brief for the objecting creditors, nor the transcript of record contains anything which justifies such attacks. We are certain, however, that the members of this honorable court are not concerned with such side issues, and hence we shall not waste any of their valua-

ble time by attempting to answer these attacks in kind or otherwise.

That brief also sets up one fictitious straw issue after another, and then proceeds to demolish it. One example will suffice. For instance, on pages 84 and 85 thereof, the following appears:

> "Again, in an effort to show that there was some especially friendly relationship existing between Mr. Lieurance and Mr. A. V. Love, which prompted Mr. Love to so express himself, the Objecting Creditors, on page 50 of their Opening Brief, say:
>
> > 'By way of illustration, the Penney Company have been selling large amounts of merchandise to A. V. Love & Company at Seattle, Washington (one of the largest creditors of Pilcher & Co., Inc.) Mr. Lieurance so testified.
> >
> > 'Did the receivership for Pilcher & Co., Inc., as conducted by Mr. Lieurance, do likewise and make *large sales* of goods at a profit to A. V. Love & Company? No, *on the contrary,* the receivership purchased substantially large quantities of goods from Love & Company and it is fair to infer that Love & Company made a reasonable profit upon the thing.'"

If the court will turn to page 50 of our opening brief, it will readily discover that the portion quoted therefrom was not used "in an effort to show that there was some especially friendly relationship existing between Mr. Lieurance and Mr. A. V. Love" which prompted Mr. Love to write a letter to Mr. Frazier, the chairman of the New York creditors' committee, approving the work of Messrs. Lieurance and Eliassen, and refusing to object to the amount of fees which had been allowed to them by the court.

On the contrary, the quoted part of our opening brief was used solely as a part of our argument to the effect that the Receiver in the case at bar was not called upon to exercise his talents along the line of the main purpose for which an expert in the running of chain stores would be required to exercise it, to-wit, that of purchasing various kinds of merchandise in very large quantities so as to secure the cheapest price possible, and of shipping them in carload lots so as to secure the cheapest freight possible. The argument had nothing whatever to do with the question of the existence or non-existence of friendly relations between Mr. Lieurance and Mr. A. V. Love as a basis for the latter's approval of the fees which had been allowed by the court to Mr. Lieurance.

In our "Statement of the Case" in our opening brief, we have recited undisputed facts only, and have stated them with fairness to both sides of this controversy.

Some alleged facts, outside of the record, have been injected into their reply brief by the attorneys for Mr. Lieurance and Mr. Eliassen, and solely by way of response thereto, we shall presently call the attention of this court to a letter recently received by Mr. Wren from Mr. Ernst, who was appointed by the New York court of original jurisdiction herein as attorney for the Receivers.

REAL AND SOLE ISSUES REQUIRING CONSIDERATION.

It stands as an admitted fact in this proceeding that the net amount obtained by the Receivers from the sale of assets is the sum of $466,980.40.

The aggregate amount allowed in both jurisdictions for Receivers' fees is $42,500.00 and for attorneys' fees $45,000.00.

The correct rule of law to be applied in fixing the amount to be paid to the Receivers in this case seems to be the one which was laid down in the case of *Grant v. Bryant,* 101 Mass. 570, to-wit, that the Receivers should be allowed only "such an amount as would be reasonable for the services *required* of and rendered by a person of *ordinary* ability and competent for such duties and services."

If this is a correct statement of the law, it seems to follow logically that the aggregate amount of $42,-500.00 which was allowed to the Receivers in this case is excessive, and that manifest error was committed by the lower court in making the allowances herein.

Moreover, it stands undisputed in this proceeding that no extraordinary services were performed by the attorneys for the Receivers in either or any jurisdiction. Hence, the aggregate amount of $45,000.00 for attorneys' fees also seems to be excessive for the reasons set forth in our opening brief.

In our opening brief we have not attacked either the motives or character of the Receiver Lieurance or his attorney. We merely have quoted certain cor-

respondence by letters and telegrams between Mr. Lieurance and his co-Receiver, Mr. Gotthold, and have called attention to certain significant omissions from the telegrams sent by Mr. Lieurance to Mr. Gotthold. If it follows as a natural and irresistible inference therefrom that Mr. Lieurance endeavored to make an unfair contract with Mr. Gotthold regarding fees by concealing material facts from him and also by attempting to mislead him into the belief that Mr. Lieurance was in Oakland when in truth and in fact he was in Portland, Oregon, securing the last of his *ad interim* allowances of fees, it is not our fault and Mr. Lieurance has no one to blame but himself if those telegrams indicate that he was not acting in that high degree of good faith toward his co-Receiver which is imposed upon him by the law.

From that correspondence (and all thereof is set forth in our opening brief) the inference seems irresistible and inescapable that Mr. Lieurance wilfully and deliberately brought about the situation which resulted in the allowance of excessive fees in the aggregate for the New York and the western jurisdictions by refusing to aid Judge Hand or the Creditors' Committee in New York with information which it was his legal duty to give at least to his co-Receiver, Mr. Gotthold, for the protection of the creditors who were the equitable owners of the fund which was in his hands. We have discussed this point quite fully in our opening brief.

In conclusion, we merely desire to add that after the reply brief for the Receiver and his attorney had

been served upon us, Mr. Grant H. Wren wrote to Messrs. McManus, Ernst & Ernst requesting information regarding the matters outside of the record which have been inserted in the aforesaid reply brief, and he received a reply from them dated December 6, 1929, which contains the following statements regarding that matter:

> Grant H. Wren, Esq.,
> 444 Market Street,
> San Francisco, California.
> My dear Mr. Wren:
>
> Re: R. A. Pilcher Co., Bankrupt
>
> (First paragraph of the letter omitted because it is of a personal nature.)
>
> Coming now to the matter you mention in your letter of the 29th ultimo, you will recall that there were many claims pending and undetermined before Mr. Cardozo, appointed Special Master to hear and determine claims to which objections had been filed. There were three claims which differed from all the rest in that they were not based upon Account Payable for merchandise, but were predicated on the sale of stock by the corporation and the attempted rescission by the stockholders of the respective contracts made between them and the company, prior to the bankruptcy. Much testimony was taken in connection with these claims and elaborate briefs were submitted. The Mandel claim differed from the other two, and the testimony indicated that there was a fair chance of the claimant succeeding. It was then that we attempted to adjust the matter on a basis of 50% of the amount of the claim, that is, the Receiver here offered to allow the claim for 50% of the amount for which it was filed, and to pay a dividend on the reduced amount. That, in effect, would give the claimant 25% of the amount of his claim. To induce the claimant to accept that compromise it was pointed out to

Mandel's attorney that it was possible that he might win his case and there be no money left for him. That brought up the question as to whether the Receiver here would be personally liable in the event that the Mandel claim was allowed in full and there were insufficient moneys to pay it.

With all these circumstances before us it was deemed advisable to make the adjustment and the agreement was accordingly made that the Mandel claim be allowed at 50% of the amount for which it was filed, dividend to be paid out of money then in the hands of Mr. Gotthold, as Receiver, or subsequently to come into his hands. Eventually moneys were sent by Lieurance to Mr. Gotthold and such moneys were used to pay the fees of the Special Master and to pay the Referee, Mr. Stephenson, and the balance was used to pay Mr. Mandel. When it was determined that there would be insufficient to pay Mandel in accordance with the stipulation made by us we prevailed upon the attorneys for Mandel to accept what was left, and we were fortunate in succeeding in having that attorney acquiesce, and in obtaining an order closing the situation.

The order gives to Mandel the balance of moneys *then* in the possession of Mr. Gotthold, and in one instance those moneys are described as "balance in his *possession*" but that balance was fixed at $499.76, and certainly there can be no contention that Mandel is entitled to any other moneys which might hereafter come into the possession of Gotthold, or to the possession of which Gotthold was then entitled. The situation was dealt with as it then existed, and we were considering only the funds which Mr. Gotthold *then* had in his possession, and which he was then able to distribute.

Moreover, it was well understood at that time that an action or proceeding was pending to compel Lieurance and Eliassen to pay back certain

moneys, and in the petition upon which the order of December 10th, 1928, was based there appears the following language:

> "No assets have been turned over to the Trustee in Bankruptcy, nor will there be any assets to be turned over to said Trustee unless Mr. Lieurance and his attorney Edward R. Eliassen, Esq., turn back, or are forced to turn back in proceedings brought by certain creditors, a part of the fees awarded to them in the ancillary proceedings in California."

Therefore, it will be observed that even though there was a disposition of the moneys *then* available to Mr. Gotthold (that is, in November, 1928) it was clearly understood and represented to the Court that additional moneys might come into the estate. But it was also understood, and it must now be understood, that those moneys, if they are brought into the estate, must be delivered to or paid over to the Trustee in Bankruptcy.

You will also recall that all of the claims filed in the equity proceedings have been lodged with the Referee in Bankruptcy, and in the event that any money is received from Lieurance and Eliassen (and we fully expect that there will be a return of such money) that money will be immediately distributed in the bankruptcy proceedings.

As above stated, all claims have been filed with the Referee, and it will be a comparatively simple matter to prepare a dividend sheet and distribute the moneys in the same way as they were distributed in the equity proceedings.

Further, Mr. Gotthold, the Trustee in Bankruptcy, has reported to the Referee in Bankruptcy from time to time, and in all of those reports a mention of the proceedings now pending in the Circuit Court of Appeals in the Ninth Circuit has been made and the Referee is fully advised thereof.

This letter is being written at some length and in some detail because you asked for a full statement. Naturally you may use all or none of it.

Sincerely yours,

WEE/VC Walter E. Ernst.

Dated, San Francisco,
December 23, 1929.

Respectfully submitted,

FRANCIS J. HENEY,
CLARENCE A. SHUEY,
GRANT H. WREN,
Attorneys for Objecting Creditors.